STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-663

October 16, 2000

BANGOR-HYDRO ELECTRIC COMPANY
MAINE ELECTRIC POWER COMPANY
EMERA, INC.
CHESTER SVC PARTNERSHIP
Request for Approval of Reorganization
(Joint Petition)

ORDER ON APPEAL
OF DISCOVERY RULING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we decide not to compel Emera to produce certain documents related to its valuation of the Bangor Hydro-Electric Company (BHE) merger. We also decide not to require BHE to revise its redaction of its bid materials in a manner that may allow for the identification of bidders, but do require a revision to make the documents more comprehensible.

II. BACKGROUND

A. Emera Appeal

On September 22, 2000, a conference was held in this proceeding to resolve all outstanding discovery disputes. During the conference, the Examiners overruled Emera's objection to data requests that required disclosure of valuation studies and related valuation materials. Emera had objected to the production of such information (except for cost savings information) on the grounds that valuation information is irrelevant and was found to be beyond the scope of discovery in the recent Central Maine Power Company (CMP) merger proceeding, Docket No. 99-111. The Examiners found the material to be relevant pursuant to discovery standards, M.R.Civ.P 26(b)(1), and concluded that there was no holding in the CMP proceeding that created a precedent regarding valuation material, because the request for valuation information was withdrawn by the requesting party. *Memorandum of Decision,* Docket No. 2000-663 (Sept. 26, 2000). The Examiners noted that the "valuation exception" that resulted from the withdrawal of the request for valuation materials in the CMP proceeding became unworkable in that it allowed a discovery respondent to edit relevant materials based on its notion of what constitutes "valuation" material.

On September 27, 2000, Emera appealed the Examiners' ruling to the Commission on the grounds that the information is highly confidential, reflects the mental impressions and conclusions of Emera, constitutes material prepared in

anticipation of litigation, is not relevant to issues in the proceeding, and is not reasonably calculated to lead to admissible evidence. Emera also argued that the damage from disclosure would outweigh any claimed probative value. Specifically, Emera appealed the Examiners' ruling regarding the following data requests to the extent that they include valuation materials:

-Exam 02-47(revised): financial analyses of the merger, including rate projections
-Exam 02-53: BHE rate projections
-OPA 02-7: information provided to investment bankers or advisors
-OPA 02-8: information provided by investment bankers or advisors
-ODR 01-9: all materials provided by or to Nesbitt Burns (Emera's financial advisor) relating to the merger
-ODR 01-10: Emera's due diligence materials

The Public Advocate and Industrial Energy Consumer Group (IECG) supported the Examiners' ruling.

B. BHE Appeal

During a technical conference held on September 29, 2000, the Examiners directed BHE to provide a revised redacted version of information regarding the solicitation and review of bids to acquire the Company. The material had been redacted and submitted pursuant to Protective Order No. 2 which permitted BHE to remove information that would permit identification of the competing bidders. The Examiners ordered that revised redacted information be submitted which removes only the name, address, and geographic location of the bidders, because the redaction in the original version was so extensive so as to render the materials useless. On October 2, 2000, the Examiners revised Protective Order No. 2 consistent with the ruling made during the September 29th conference.

On October 3, 2000, BHE appealed the Examiners' ruling to the Commission, stating that ruling would lead to the disclosure of the identity of bidders, which would be harmful to their business interests, seriously impair the sanctity of the bid process and harm any future bidding process for public utility assets.

The Public Advocate and IECG supported the Examiners' ruling.

III. DISCUSSION

A. Standard of Review

We consider the Emera and BHE appeals pursuant to the statutory standard contained in section 1311-A(2)(A) of Title 35-A. Section 1311-A(2)(A) states:

> The basis for an appeal brought pursuant to this subsection is that the potential for damage resulting

> from the disclosure of the information in accordance with the protective order clearly exceeds the probative value of the information in the proceeding.

Thus, we must first consider whether the information subject to the appeal is relevant for discovery purposes. The relevancy standard for this purpose is whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. M.R.Civ.P 26(b)(1). If we find that the information sought is relevant to the potential issues in the proceeding, we then consider whether the potential for damage from the disclosure of the information outweighs its probative value in this proceeding.

B. Emera Appeal

We find that the information subject to Emera's appeal meets the discovery standard for relevancy. In this proceeding, we must consider whether the proposed merger may be harmful to ratepayers either through higher rates or lower quality of service. Thus, Emera's rate projections and other assessments of the financial impacts of the merger, which are part of its valuation materials, may lead to admissible evidence as to whether Emera will need to seek higher rates or cut back on service in order to avoid negative financial consequences from the merger.

We now consider whether the potential damage from the disclosure of the information outweighs its probative value. Emera asserts that its valuation materials are highly sensitive, containing information which form the basis for Emera's valuation of BHE, the methodology used to analyze the information, the results of the analysis, and the internal assessment of the value of BHE for purposes of making a private, market-based, decision to acquire BHE. We agree that the information is highly sensitive and substantial harm may result from its disclosure. We thus weigh this potential for harm against the probative value of the information for purposes of this proceeding.

We consider the probative value of the information relatively low because the Commission has the ultimate authority to set BHE's rates and can act to a large degree to assure that rates will not be any higher as a result of the merger even if the purchase of BHE adversely impacts the profitability of Emera. We can also act to prevent degradation in service quality through our ratemaking authority and ability to address unreasonable acts and practices of utilities. Finally, the need for Emera to produce the disputed materials is reduced by the opportunity of our staff and the parties to conduct their own analyses of the financial viability of the merger. If this occurs, Emera's own analysis will not be available to dispute the other analyses.[1]

[1] Our ruling in this matter is based on the discussion contained in this Order. To the extent not discussed, we do not address Emera's other arguments, such as claims of trade secret or trial preparation privileges.

We premise our decision, in part, on representations by Emera that it is in a healthy financial condition. If it should appear in the course of these proceedings that this premise is unfounded and that miscalculations by Emera might affect the underlying financial health, as opposed to the level of profitability, of either the parent or the subsidiary, we might well reconsider our decision and determine whether the enhanced importance of the information being sought tips the balance in the opposite direction.

To conclude, the issues raised by this appeal require a case-by-case review in which all factors and equities are carefully balanced. Accordingly, this decision should not be relied upon as creating a "valuation exception" to be part of discovery practice at the Commission.[2]

B. BHE Appeal

The BHE appeal of the Examiner's decision to modify Protective Order No. 2 essentially raises the issue of the proper degree of protection for the bids of entities seeking to acquire BHE and related materials. BHE did not initially object on relevance grounds to requests for this material and agreed to provide the bids and related documents under a protective scheme in which information that may identify the bidder would be redacted.[3] BHE only objected after the Examiners ordered less redaction because the extent of the redaction in the submitted documents made them extremely difficult to comprehend.

We conclude that the bid materials are relevant for purposes of discovery. There are scenarios for which the bid materials could lead to evidence that the merger is not consistent with the interests of ratepayers or shareholders. If, for example, other bids exist that could produce greater savings for ratepayers at equal or greater value to shareholders, admissible evidence may exist that the merger does not meet the statutory requirements of 35-A M.R.S.A. § 708.

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[2] Emera argued strongly that it relied on the "valuation exception" established in the CMP proceeding and accordingly it would be unfair to require disclosure in this proceeding. The "valuation exception" in the CMP case resulted from the requesting party clarifying that certain materials were not sought in the context of a discovery conference in which the Examiners and parties were attempting to resolve numerous discovery disputes. The issues were not extensively briefed, there was no written decision by the Examiners, and it was not a Commission decision. Emera's strong reliance based upon what occurred in the CMP case was therefore misplaced and we caution parties against similar reliance in the future. Strong reliance on Commission "precedent" should only occur when a matter has been thoroughly argued and the Commission has issued a written decision addressing the arguments and resolving the disputes.

[3] A similar protective scheme was adopted in the CMP merger proceeding.

We agree with BHE that there is a potential for damage if the identities of unsuccessful bidders are disclosed. Unsuccessful bidders could be substantially harmed if other companies interested in acquiring utilities or potential target companies know that a bidder is interested in acquiring a company like BHE and the amount it is willing to pay. We also agree with BHE that the information, other than names and addresses, that has been redacted could potentially reveal the identity of the bidder. This information is the number of customers served; total revenues; total assets; percentage of assets and revenues not subject to traditional regulation; credit ratings; and reasons unique to a bidder explaining why the bidder or BHE did not pursue the merger.

The potential for harm must be weighed against the probative value of the information. As stated above, the information is relevant for discovery purposes and, depending on the nature of the bids, could have significant probative value.[4] The documents, however, are of little value to the staff or the parties if the extent of the redaction renders them unintelligible. We conclude that a revised redaction in which individual bidders are represented by letters and the redacted language is replaced by a bracket describing the type of information that has been removed, coupled with the opportunity to further inquire into BHE's bid solicitation and evaluation process at a technical conference, equitably balances the concerns underlying this dispute.

Thus, BHE may continue to withhold identifying information regarding the bidders, but is ordered to revise its redacted material as described above. We may reconsider this matter if a review of the bid process permitted in this Order reveals information that warrants further inquiry.

Dated at Augusta, Maine, this 16th day of October, 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond

COMMISSIONER ABSENT: Nugent

[4] BHE has argued that, as a legal matter, the Commission is limited to considering only the proposed merger presented to it. This is an open question and, until it is resolved in BHE's favor, the bid materials are considered relevant and of potential probative value.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.